LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

FEBRUARY 2020

TABLE OF CONTENTS FOR FEBRUARY 2020 LEGAL UPDATE

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: OFFICER'S SHOOTING OF MAN IN SLOW-SPEED CAR PURSUIT HELD NOT ELIGIBLE FOR QUALIFIED IMMUNITY BECAUSE, AT THE TIME

OF THE SHOOOTING, CLEARLY ESTABLISHED CASE LAW HAD ESTABLISHED THAT DEADLY FORCE WAS NOT JUSTIFIED UNDER THE FACTUAL ALLEGATIONS AS VIEWED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF

Orn v. City of Tacoma, ___ F.3d ___ , 2020 WL ___ (February 3, 2020)

Factual allegations: (With the exception of the bolded paragraph below, the allegations are viewed in the best light for the plaintiff, as is required in reviewing a theory of qualified immunity under the Civil Rights Act. The allegations are excerpted from the Ninth Circuit Opinion):

> At about 8:30 p.m., Orn was driving his wife's Mitsubishi Montero on city streets when he noticed a police car with its lights activated attempting to pull him over. The officer sought to stop Orn because he was driving without his headlights on. Orn was driving with a suspended license at the time and had just smoked crack cocaine. Rather than pull over, he decided to return home to the apartment complex where he lived with his wife, as he knew she needed the car for work. As he made his way home, Orn traveled at 25-35 miles per hour and stopped at traffic lights and stop signs.
>
> It took Orn roughly 15 minutes to drive home. Along the way, additional officers joined the slow-speed pursuit, including [Officer A] and his partner [Officer B], who were driving in a Tacoma Police Department sport utility vehicle. At one point, in an effort to get Orn to stop, several police units attempted unsuccessfully to box him in. At another point, officers drove in front of Orn's vehicle to block his path, but Orn drove onto a curb and down a portion of a closed roadway to avoid them. Later in the pursuit, officers put down spike strips, which Orn managed to circumvent by swerving away from the officers and into the oncoming lane of traffic. No oncoming vehicles were traveling toward Orn at the time.
>
> As the pursuit progressed, officers correctly predicted that Orn might be returning home, since by then they had determined the address to which his vehicle was registered. [Officer A] knew that Orn's apartment complex had a long outdoor parking lot with only two entrances, one at the north end and the other at the south end. When [Officer A] saw Orn head toward the south entrance, he drove to the north end of the complex and entered there. [Officer A] positioned his SUV across a narrow point of the single access lane that ran the length of the parking lot, in an effort to prevent Orn from exiting the complex on the north end.
>
> Orn pulled into the south entrance with a caravan of police vehicles following behind him. He proceeded slowly down the access lane toward the north end of the complex. When he approached [Officer A's] SUV and saw that it was blocking his path, he paused and came to a brief stop.
>
> The diagram below depicts the scene of the events that transpired next. [Officer A] was standing on the grassy area to the left of his SUV as Orn approached. He had his gun drawn with the barrel pointed toward the ground and repeatedly yelled at Orn to stop. [Officer A] had no reason to believe that Orn had a firearm, and in fact he did not. Orn saw [Officer A] and heard his commands but ignored them.

After briefly stopping in front of [Officer A's] SUV, Orn drove away from where [Officer A] was standing and attempted to navigate through a narrow opening between the passenger side of [Officer A's] SUV and a nearby parked car. To do so, Orn had to drive up a curb onto a small patch of grass between the two vehicles and then turn his vehicle to the right. Given the tightness of the space, Orn was driving very slowly as he attempted this maneuver. He estimated his speed at five miles per hour, as did officers at the scene.

When Orn began maneuvering around [Officer A's] SUV, another officer, Steven [Officer B], backed his patrol vehicle into Orn's line of travel to cut off any path of escape through the complex's north entrance. That move caused Orn to turn his vehicle more sharply to the right to avoid hitting Officer [Officer B's] vehicle.

As Orn moved past [Officer A's] SUV, the panel near the passenger-side rear wheel of Orn's vehicle clipped the passenger-side rear quarter panel of [Officer A's] SUV. [Officer B], who remained inside the SUV and felt the impact, described it as a "glancing blow." The left front corner of Orn's vehicle also struck the right front corner of [Officer B's] vehicle. Just after Orn's vehicle moved past [Officer A's] SUV, Orn saw [Officer A] run toward his vehicle on the passenger side and begin firing at him. The first round entered through the front passenger-side window of Orn's vehicle; the second and third rounds entered through the rear passenger-side window. One of those rounds struck Orn in the

spine, which caused Orn's body to go numb. He slumped into the passenger seat and the engine of his vehicle revved loudly as his foot floored the accelerator. [Officer A] ran behind Orn's vehicle as it sped away, firing seven more rounds through the rear windshield.

[Officer A] disputes this account of the shooting. His account differs from Orn's in two key respects: the manner in which Orn maneuvered his vehicle around [Officer A's] SUV, and where [Officer A] was standing when that occurred. According to [Officer A], as soon as he saw Orn drive up the curb onto the patch of grass, he ran from where he had been standing and took up a position behind the rear bumper near the passenger side of his SUV, as depicted by the faint blue figure in the diagram above. [Officer A] contends that, as Orn maneuvered between [Officer A's] SUV and the parked car, Orn turned his wheels sharply to the right, which placed [Officer A] in the path of Orn's vehicle. At the same time, [Officer A] says, Orn stepped on the gas and propelled the vehicle toward him under "hard acceleration," causing him to fear that he would be run over by Orn's vehicle or pinned between his vehicle and Orn's. According to [Officer A], he placed his left hand on the side of Orn's vehicle to brace for the impact while simultaneously raising his right arm above his shoulder. He then fired one or two rounds downward into Orn's vehicle as it passed by. [Officer A] asserts that he chased after Orn's vehicle and continued to fire at it from behind because he feared for the safety of [Officer B], who he thought might be standing in the area where Orn's vehicle was headed.

After [Officer A] stopped firing, Orn's vehicle continued forward and hit several parked cars before crashing into a chain-link fence, which stopped the vehicle's forward progress. Officers took Orn into custody and summoned medical help. In all, three of the ten rounds fired by [Officer A] struck Orn. The bullet that lodged in his spine has left him paralyzed from the waist down.

County prosecutors charged Orn with using his vehicle to assault [Officer A] and with attempting to elude a pursuing police vehicle. The jury acquitted Orn of the assault charge. It also acquitted him of the eluding charge, convicting him instead of the lesser-included offense of failure to obey a law-enforcement officer. Orn was ordered to pay a fine of $250.

[Bolding added; citations to the District Court record omitted]

Proceedings below: (Excerpted from Ninth Circuit Opinion)

> Orn sued [Officer A] and the City of Tacoma under 42 U.S.C. § 1983, alleging a violation of his Fourth Amendment right to be free from the use of excessive force. [Officer A] moved for summary judgment on the basis of qualified immunity. The district court denied the motion . . . .

ISSUES AND RULINGS: (1) Viewing the factual allegations in the best light for plaintiff Orn, did Officer A use excessive force under the Fourth Amendment when he shot and severely wounded plaintiff? (ANSWER BY NINTH CIRCUIT: Yes, use of deadly force was excessive)

(2) Viewing the factual allegations in the best light for plaintiff Orn, had case law clearly established at the time of Officer A's shooting of Orn that such usage of deadly force was

excessive force under the circumstances such that Officer A is not entitled to qualified immunity? (ANSWER BY NINTH CIRCUIT: Yes, case law was clearly established against use of deadly force under these circumstances)

Result: Affirmance of U.S. District Court (Tacoma, WA) ruling denying qualified immunity to Officer A.

QUALIFIED IMMUNITY ANALYSIS PROTOCOL

When an officer asserts qualified immunity as a defense, judicial analysis proceeds in two steps.

STEP 1: The court first asks whether the facts taken in the light most favorable to the plaintiff show that the officer's conduct violated a constitutional right (there is a narrow exception to this best-light view of the factual allegations in circumstances where plaintiff's claims are blatantly contradicted by the record so that no reasonable jury could believe it, but that exception was not found to exist in this case).

STEP 2: If the answer is "yes, a constitutional violation occurred," the court then asks whether the right in question was clearly established under the case law existing at the time of the officer's actions (again viewing the factual allegations in the best light for plaintiff), such that any reasonably well-trained officer would have known that the conduct violated the constitution.

Courts have the discretion to skip the Step 1 in certain circumstances, as when the officer is plainly entitled to prevail at Step 2. In this case, however, the Ninth Circuit panel addresses both steps of the analysis, and the panel resolves both steps against Officer A.

ANALYSIS: (Excerpted from Ninth Circuit Opinion; bracketed text added)

(1) Excessive force was used under the circumstances viewed in the best light for plaintiff

> Determining whether an officer's use of force violates the Fourth Amendment requires balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Tennessee v. Garner, 471 U.S. 1, 8 (1985). That inquiry generally involves an assessment of factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." . . . In the context involved here, the Supreme Court has crafted a more definitive rule: An officer may use deadly force to apprehend a fleeing suspect only if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Garner, 471 U.S. at 11. A suspect may pose such a threat if "there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm," or if the suspect threatens the officer or others with a weapon capable of inflicting such harm.
>
> The key question, then, is whether [Officer A] had an objectively reasonable basis for believing that Orn posed a threat of serious physical harm, either to [Officer A] himself or to others. . . . Taking the facts in the light most favorable to Orn, and giving due deference to [Officer A's] assessment of the danger presented by the situation he confronted, we conclude the answer is no.

1. [NO SERIOUS THREAT TO OFFICER A] We'll begin with the threat to [Officer A] himself. A moving vehicle can of course pose a threat of serious physical harm, but only if someone is at risk of being struck by it. According to Orn's version of events, [Officer A] was never at risk of being struck by Orn's vehicle because he was never in the vehicle's path of travel. As Orn's vehicle moved past [Officer A's] SUV, [Officer A] ran toward the passenger side of Orn's vehicle and opened fire through the passenger-side windows. At that point, [Officer A] could not reasonably have feared for his own safety because he was on the side of Orn's vehicle as it was traveling away from him. . . . And [Officer A] was obviously not in harm's way as he chased after Orn's vehicle and fired additional rounds at Orn through the rear windshield.

[Officer A] does not dispute that an officer who fires into the side or rear of a vehicle moving away from him lacks an objectively reasonable basis for claiming that he did so out of fear for his own safety. He instead urges us to analyze the lawfulness of his actions under his version of events, in which he stood in the path of Orn's vehicle as it accelerated toward him, causing him to fear for his life. As noted at the outset, we cannot analyze the case through that lens because [Officer A's] version of events conflicts with the facts construed in the light most favorable to Orn. . . .

Most fundamentally, Orn's testimony provides an account of the shooting in which [Officer A] was never at risk of being struck by Orn's vehicle. Although Orn's testimony alone would be sufficient to create a material factual dispute on this point, [Officer B's] testimony provides additional support for Orn's version of events. [Officer B] testified that he saw [Officer A] standing behind the rear bumper of the SUV only after [Officer A] fired the first round of shots, and that he did not see [Officer A] make any physical contact with Orn's vehicle. [Officer B] also testified that he heard Orn's engine rev and saw the vehicle accelerate after the first shots were fired, not before as [Officer A] maintains. A reasonable jury could find [Officer B's] testimony significant because his vehicle was parked facing the rear passenger side of [Officer A's] SUV, giving him an up-close vantage point from which to see and hear what transpired just before the shooting.

. . . .

Even if a jury found that [Officer A] was standing behind the rear bumper of his SUV, as he claims, it could still conclude that [Officer A] lacked an objectively reasonable basis to fear for his own safety. As Orn's vehicle approached, [Officer A] concedes that he was not initially in the vehicle's path of travel. He contends that his safety was imperiled when Orn turned his wheels more sharply to the right to squeeze between [Officer A's] SUV and Officer [Officer B's] patrol car. At that point, Orn's vehicle was moving at just five miles per hour. [Officer A] could therefore have avoided any risk of being struck by simply taking a step back, a common-sense conclusion confirmed by [Officer A's] own admission that he "was able to step backwards and get out of the path of Mr. Orn's vehicle." . . .

[COURT'S FOOTNOTE 1: *We need not decide whether a jury could find [Officer A's] use of deadly force unreasonable based in part on his decision to move from the grassy area where he had been standing (a position of relative safety) to take up a more dangerous position behind the rear bumper of his SUV as Orn's vehicle approached. The reasonableness of an officer's use of force must be judged by considering "the*

totality of the circumstances," Garner, 471 U.S. at 8–9, and several circuits have held that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive." . . . . In County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), the Supreme Court did not foreclose this theory of liability, even as it rejected our circuit's former "provocation rule."*]

2. [NO SERIOUS THREAT TO OTHERS] The remaining question is whether [Officer A] had an objectively reasonable basis for believing that Orn posed a threat of serious physical harm to others. On this point, in both the district court and before our court, [Officer A] has argued only that Orn posed a threat to his partner, Officer [Officer B]. As noted earlier, [Officer A] mistakenly (but reasonably) believed that Officer [Officer B] had exited the SUV and may have been standing in the area where Orn's vehicle was headed. In fact, Officer [Officer B] remained inside the SUV until after the shooting.

[Officer A] claims that he feared for the safety of Officer [Officer B] because Orn had just attempted to run [Officer A] over and thus might have been inclined to assault Officer [Officer B] as well. But if a jury rejects [Officer A's] account of the shooting and concludes that [Officer A] was never at risk of being struck by Orn's vehicle, nothing else Orn had done suggested that he posed a threat to the safety of [Officer B]. Orn was driving at a slow speed in a non-reckless manner as he maneuvered around [Officer A's] SUV, and although his vehicle clipped [Officer A's] SUV and Officer [Officer B's] patrol car as he maneuvered between them, the contact was slight and clearly accidental. . . .

[Officer A] has not argued that his use of deadly force was justified on the theory that permitting Orn to escape could have posed a threat to the safety of the general public. Nor is there any basis in the record for making such an argument. A fleeing suspect's escape can pose a threat to the public when police have probable cause to believe that the suspect has committed a violent crime, see Garner, 471 U.S. at 11, but neither of the offenses for which Orn was wanted involved any sort of violence. Such a threat can also exist when the suspect has driven in a manner that puts the lives of pedestrians or other motorists at risk, as by leading officers on a high-speed chase. . . . [citing cases] In such cases, officers have an interest in terminating the suspect's flight because the flight itself poses a threat of serious physical harm to others. But to warrant the use of deadly force, a motorist's prior interactions with police must have demonstrated that "he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around." . . . .

A reasonable jury could conclude that Orn did not engage in any such conduct here, and that [Officer A] therefore had no basis for believing that Orn would pose a threat of serious physical harm to the general public if permitted to escape. Construing the facts in the light most favorable to Orn, he never targeted officers with his vehicle or forced other vehicles off the road. In addition, he traveled at normal speeds and stopped at traffic lights and stop signs throughout the pursuit. Indeed, the Tacoma Police Department's Pursuit Review Committee conducted a review of the pursuit and classified it as involving only a "Failure to Yield," which occurs when a driver "fails or refuses to immediately bring his or her vehicle to a stop, and drives in a manner that is not reckless and does not pose an immediate threat to community safety."

> **In his brief before our court, [Officer A] hints at a different view of the facts, but in doing so he simply highlights the factual disputes that a jury must ultimately resolve. . . .**

[Some citations omitted, others revised for style; bolding and bracketed language added]

(2) Case law was clearly established against use of deadly force at the time of the shooting, so qualified immunity does not apply under the facts as viewed in the best light for the plaintiff Orn

Turning to the second step of the qualified immunity analysis, the Ninth Circuit panel holds that plaintiff Orn's right to be free from the use of excessive force was clearly established by case law at the time of the shooting. The Ninth Circuit panel notes that in October 2011, at least seven circuits had held that an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him.

The panel asserts that, taking the factual allegations in the light most favorable to plaintiff, a reasonable jury could conclude under clearly established case law both that Officer A was never in the path of plaintiff's vehicle, and that he fired through the passenger side windows and rear windshield as the vehicle was moving away from him. The panel further asserts that under plaintiff's version of events, again per clearly established case law, he never engaged in any conduct that suggested his vehicle posed a threat of serious physical harm to any other person.

****

WASHINGTON STATE SUPREME COURT

CRIMINAL CONVICTION FOR UNLAWFUL PRACTICE OF LAW (RCW 2.48.180) AS A STRICT LIABILITY CRIME UPHELD AGAINST CONSTITUTIONAL, SUFFICIENCY-OF-EVIDENCE AND OTHER CHALLENGES IN CASE INVOLVING FORMER REALTOR'S PROMOTION OF ADVERSE POSSESSION SCHEME

In State v. Yishmael, ___ Wn.2d ___ , 2020 WL ___ (February 6, 2020), the Washington Supreme Court rules 6-3 in affirming the conviction of defendant for unlawful practice of law. The Majority Opinion describes the factual and procedural background of the case as follows:

> In October 2014, four people were arrested. They were among many people who had been advised by Yishmael that they could take up residence in apparently abandoned foreclosed homes and, by changing the locks, moving in, improving the properties, and filing a variety of papers with the recorder's office, acquire title through adverse possession. Yishmael charged $7,000-$8,000 for his advice and assistance in adversely possessing homes. His clients also spent thousands of dollars repairing and improving the properties. Some lost almost everything they owned.
>
> Yishmael was charged with several crimes, including theft and the unlawful practice of law. He testified in his own defense. Yishmael did not dispute that he gave his clients advice on homesteading, adverse possession, and talking with police who might challenge his clients' right to be in the homes, and that he offered assistance in completing documents to be filed with the county recorder's office. He also testified that he never held himself out to be a lawyer and, based on his review of the unlawful practice of law statutes in Title 2 RCW, he did not believe he was practicing law.

> The jury acquitted Yishmael of the theft and theft-related charges. It found him guilty of the unlawful practice of law charge.

Under RCW 2.48.180(2), it is the unlawful practice of law when

> (a) **A non-lawyer practices law, or holds himself or herself out as entitled to practice law;**
> (b) A legal provider holds an investment or ownership interest in a business primarily engaged in the practice of law, knowing that a non-lawyer holds an investment or ownership interest in the business;
> (c) A non-lawyer knowingly holds an investment or ownership interest in a business primarily engaged in the practice of law;
> (d) A legal provider works for a business that is primarily engaged in the practice of law, knowing that a non-lawyer holds an investment or ownership interest in the business; or
> (e) A non-lawyer shares legal fees with a legal provider.

RCW 2.48.180(2) (emphasis added).

The first offense is a gross misdemeanor. RCW 2.48.180(3)(a). Three of the subsections have a statutory intent element listed: knowledge. RCW 2.48.180(2)(b)-(d). Yishmael was charged under subsection (a), which is one of the two subsections that does not contain an express statutory mental state element.

General Court Rule 24 of the Washington Court Rules provides a definition of the practice of law, starting with a "general definition" and then providing some express examples. The "general definition" provides as follows:

> The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law.

The Majority Opinion in Yishmael concludes, among other things, that (1) the statute defining the crime of unlawful practice of law, RCW 2.48.180, is not void for vagueness; (2) the jury was properly instructed that the crime is a strict liability offense; and (3) the evidence is sufficient to support the conviction. The introduction to the Majority Opinion summarizes the ruling and its underlying spirt as follows:

> Admission to the practice of law requires years of graduate level study either with a practicing lawyer or at a law school. It requires passage of a rigorous bar examination on a wide range of topics. In addition, bar applicants must satisfy character and fitness requirements. Once admitted, lawyers join a noble profession and become officers of the court, obligated to conduct themselves ethically under the Rules of Professional Conduct. When lawyers break the rules, they are subject to discipline. When lawfully practicing attorneys cause harm, malpractice insurance and the victims' compensation fund can provide some relief for their clients.
>
> By contrast, the unlawful practice of law often causes harm without any of the protections for malpractice by lawyers. Because these harms are predictable, the unlawful practice of law is a crime. RCW 2.48.180(3). This case is illustrative. Victims in this case became homeless, were jailed, and lost almost everything they owned.

> This court has the "exclusive power to regulate the practice of law," and in accordance with constitutional separation of powers principles, our legislature has not attempted to define the "practice of law." Hagen & Van Camp, P.S. v. Kassler Escrow, Inc., 96 Wn.2d 443, 445, 635 P.2d 730 (1981) (citing Wash. Const, art. IV, § 1). The "practice of law," however, has been defined in common law and, more recently, a court rule, GR 24.
>
> Naziyr Yishmael, who is not an attorney, advised clients that they could "homestead" in apparently abandoned properties and, after a period of time, acquire title through adverse possession. After some of his clients were arrested for taking up residence in other people's houses, he was charged with and convicted of misdemeanor unlawful practice of law. He contends his conviction must be reversed for five reasons. He contends the jury was improperly instructed that the unlawful practice of law is a strict liability offense. He contends the court's use of GR 24 to define the practice of law violates separation of powers; he contends this use amounts to a comment on the evidence. He contends that the statute is unconstitutionally vague. Finally, he contends that there was insufficient evidence presented to sustain his conviction. Finding no error, we affirm.

The Dissenting Opinion is authored by Justice Wiggins and joined by Justices Madsen and Gordon McCloud. The Dissenting Opinion argues that (1) in order to avoid sweeping so broadly as to punish a wide spectrum of innocuous uncompensated casual advice given in ordinary daily discourse, and (2) in order to avoid punishing constitutionally protected speech, the unlawful practice of law statute should be interpreted not as a strict liability crime but as containing a knowledge element.

Result: Affirmance of Division One Court of Appeals decision that affirmed the King County Superior Court conviction of Naziyr Yishmael for unlawful practice of law.

WASHINGTON SUPREME COURT ADDRESSES FACT-SPECIFIC QUESTION OF WHETHER JURY SHOULD HAVE BEEN GIVEN A FIRST-AGRESSOR INSTRUCTIION IN SHOOTING CASE WHERE DEFENDANT CLAIMED SELF-DEFENSE

In State v. Grott, ___ Wn.2d ___ , 2020 WL ___ (February 20, 2020), the Washington Supreme Court reverses a decision of Division Two of the Court of Appeals and holds that the evidence supports the superior court instruction to the jury that the jury could not accept defendant's self-defense claim if the jury were to find beyond a reasonable doubt that he was the first aggressor.

The trial court's first aggressor instruction in Grott reads as follows:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon [kill] another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense to murder, manslaughter or assault.

Among other things, the Supreme Court rules that when a defendant in an assault or criminal homicide case engages in a course of aggressive conduct, rather than committing a single aggressive provocative act, the provoking act that justifies the first aggressor instruction can be part of a course of conduct.

Result: Reversal of Division Two Court of Appeals decision and reinstatement of Pierce County Superior Court judgment on jury verdict finding Robert DeShawn Grott guilty of one count of second degree murder and seven counts of first degree assault, each with a firearm special verdict.

****

WASHINGTON STATE COURT OF APPEALS

IN 2-1 DECISION, PANEL AVOIDS STANDING ISSUE – FOR NOW – AND RULES THAT SEARCH WARRANT AUTHORIZING SEIZURE OF CELL PHONE DID NOT IMPLICITLY AUTHORIZE SEARCH OF THE PHONE THAT DISCLOSED TEXTS FROM THE DEFENDANT

State v. Fairley, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, February 18, 2020)

Facts and Proceedings below: (Excerpted from Court of Appeals Majority Opinion)

> In July 2013, the Pasco Police Department received reports of telephonic bomb threats directed at Columbia Basin College. An investigation led to a cell phone number associated with an individual named Steven Brown, who lived in Kenn ewick. On July 24, 2013, the Franklin County Superior Court issued a warrant authorizing law enforcement to search two areas: (1) Mr. Brown's residence and (2) his Jeep Cherokee. The warrant was based on a probable cause affidavit indicating evidence of the crime of threats to bomb would be found at Mr. Brown's property. The warrant authorized seizure of listed property, including Mr. Brown's cell phone. The warrant did not specifically authorize a search of the cell phone or any of the other listed items to be seized. No subsequent warrants were sought or obtained.
>
> [Court's footnote: *The dissent claims the cell phone was a "'burner'" phone with limited storage capacity. That information is not part of the record on review. In discussing cell phones, the warrant affidavit identified cell phones as items capable of storing "hundreds of thousands of pages of information" that could require "weeks or months" to sort*.]
>
> Despite the lack of an express authorization, law enforcement proceeded to search the contents of Mr. Brown's cell phone. On December 31, 2013, forensic testing recovered 17 text messages sent to Mr. Brown's phone from a number associated with Zachary Fairley.
>
> Although there was no indication Mr. Fairley was involved in the bomb threats, the recovered text messages revealed Mr. Fairley communicated with Mr. Brown's daughter for purposes of prostitution. Mr. Fairley was then charged in Franklin County District Court with multiple misdemeanor offenses.
>
> Mr. Fairley moved to suppress the text message evidence. The district court judge denied the motion on two bases: (1) Mr. Fairley did not have standing to object to the search of Mr. Brown's phone and (2) "although the warrant said 'seize' and did not mention the term 'search,'" it provided adequate authorization to search the phone.
>
> Mr. Fairley exercised his right to a jury trial and was convicted of several charges. Mr. Fairley appealed to the Franklin County Superior Court. On September 6, 2017, the

superior court affirmed Mr. Fairley's convictions, including the search of the cell phone and seizure of his text messages, and dismissed the appeal. Unlike the district court, the superior court ruled Mr. Fairley had standing to challenge the search of Mr. Brown's phone pursuant to State v. Hinton, 179 Wn.2d 862 (2014), and State v. Roden, 179 Wn.2d 893 (2014). Nevertheless, the superior court concluded Mr. Fairley lost his expectation of privacy when the existing contents of Mr. Brown's phone were divulged to law enforcement through "a valid search warrant."

The court rejected Mr. Fairley's complaint that the warrant did not actually authorize a search by pointing out the purpose of the warrant "was to search the data stored in the cell phone" and reasoning the warrant "contained language routinely used by local courts and generally understood to allow for a search of the seized device."

[Citations to the record omitted; some case citations revised for style; some paragraphing revised for readability]

ISSUE AND RULING: Where the search warrant expressly authorized the seizure of Mr. Brown's cell phone but did not expressly authorize a search of the contents of the phone, did the search of the contents of the phone violate the particularity requirement of the Fourth Amendment? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority, the search of the phone violated the particularity requirement)

Result: Reversal of Franklin County Superior Court order that dismissed Zachary James Fairley's appeal from his District Court convictions for various misdemeanor offenses; case remanded to the Superior Court to address questions of Mr. Fairley's standing to bring his challenge, as well as Mr. Fairley's privacy rights, if any, in the contents of Mr. Brown's phone.

ANALYSIS: (Excerpted from Court of Appeals Majority Opinion)

It is readily apparent the warrant here did not authorize a search of the contents of Mr. Brown's cell phone. While law enforcement undoubtedly obtained the warrant in hopes of conducting a search, permission to search the phone was neither sought nor granted. [United States v. Russian, 848 F.3d 1239, 1245 (10th Cir. 2017) (Authorization to seize a cell phone does not confer authorization to search.)].

As explained in [Riley v. California, 573 U.S. 373 (2014)], the privacy interests implicated by a cell phone seizure are much different from those of a search. Modern cell phones are akin to powerful "minicomputers." They contain information touching on "nearly every aspect" of a person's life "from the mundane to the intimate."

A cell phone search will "typically expose to the government far more than the most exhaustive search of a house." Given this potential exposure to private information [recognized in Riley], authorization to search the contents of a cell phone does not automatically follow from an authorized seizure. Instead, law enforcement officers must obtain a warrant that complies with the Fourth Amendment's particularity requirement.

[Court's footnote: *While Riley did not address the required substance of a cell phone warrant, the Supreme Court indicated a warrant was necessary to protect against "the reviled 'general warrants' and 'writs of assistance' of the colonial [period], which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." 573 U.S. at 403. Given this discussion, it is apparent the court*

expected a cell phone warrant would comport with the Fourth Amendment's particularity requirement.]

To hold that authorization to search the contents of a cell phone can be inferred from a warrant authorizing a seizure of the phone would be to eliminate the particularity requirement and to condone a general warrant. This outcome is constitutionally unacceptable. The particularity requirement envisions a warrant will describe items to be seized with as much specificity as possible.

Narrow tailoring is necessary to prevent "over-seizure and over-searching" beyond the warrant's probable cause authorization. . . . A search warrant allowing for a "top-to-bottom search" of a cell phone fails to meet this requirement. [State v. Henderson, 289 Neb. 271, 289, 854 N.W.2d 616 (2014), cert denied, 135 S. Ct. 2845 (2015); Buckham v. State, 185 A.3d 1, 18-19 (Del. 2018) ("[W]arrants issued to search electronic devices call for particular sensitivity.")].

Rather than allowing law enforcement officers to operate through inferences, the Fourth Amendment demands a cell phone warrant specify the types of data to be seized with sufficient detail to distinguish material for which there is probable cause from information that should remain private. For example, in addition to identifying the crime under investigation, the warrant might restrict the scope of the search to specific areas of the phone (e.g., applications pertaining to the phone, photos, or text messages), content (e.g., outgoing call numbers, photos of the target and suspected criminal associates, or text messages between the target and suspected associates) and time frame (e.g. materials created or received within 24 hours of the crime under investigation). [The search warrant] might also require compliance with a search protocol, designed to minimize intrusion into personal data irrelevant to the crime under investigation. . . .

There are likely a variety of ways to meet the Fourth Amendment's particularity requirement in the context of cell phone searches. But one rule is absolute: the responsibility for setting the bounds of the search lies with the judicial officer issuing the warrant, not with the executing officer.

Contrary to the State's protestations, State v. Figeroa Martines, 184 Wn.2d 83 (2015), is inapplicable in the current context. Figeroa Martines involved alcohol concentration testing of a blood sample seized pursuant to a blood draw warrant. The warrant found probable cause to believe the blood sample would contain evidence of driving under the influence (DUI).

On appeal, the defense argued the blood draw warrant failed to satisfy the Fourth Amendment's particularity requirement because it did not explicitly grant the State permission to test the blood sample. Our Supreme Court easily rejected this argument . As the court explained [in Figeroa Martines], "[a] warrant authorizing a blood draw necessarily authorizes blood testing, consistent with and confined to the finding of probable cause." Read in a common sense manner, the warrant "authorized not merely the drawing and storing of a blood sample but also the toxicology tests performed to detect the presence of drugs or alcohol."

Searching the contents of a cell phone is much different than testing a blood sample for drugs or alcohol. A cell phone provides access to a vast amount of material protected

> by the First Amendment. As a result, the search of a cell phone presents heightened particularity concerns that are not present in the context of blood alcohol testing.
>
> In addition, the target of a DUI blood draw search is both narrow and obvious – the blood sample is to be tested for the presence of drugs or alcohol pursuant to a well established protocol. But as detailed in the United States Supreme Court's decision in Riley, a search of a cell phone is wide and exceedingly complex.
>
> A cell phone data search can reveal a user's travel history, weight loss goals, religious beliefs, political affiliations, financial investments, shopping habits, romantic interests, medical diagnoses, and on and on. Without explicit judicial oversight, cell phone searches pose a danger of governmental overreach far beyond what was envisioned by the architects of the Fourth Amendment.
>
> The judiciary must take care to ensure scientific progression does not erode the Fourth Amendment's privacy protections. . . . In the current context, that means enforcement of the Fourth Amendment's warrant and particularity requirements.

[Some citations omitted, others revised for style; some paragraphing revised for readability]

MAJORITY OPINION'S REMAND DIRECTIVE

The Majority Opinion's "conclusion" reads as follows:

> The superior court's order dismissing Mr. Fairley's appeal is reversed. Because it is unclear whether our disposition may impact the superior court's ruling as to Mr. Fairley's standing and reasonable expectation of privacy, this matter is remanded to the superior court for further proceedings consistent with the terms of this decision.

DISSENTING OPINION

Judge Kevin Korsmo disagrees with the Majority Opinion's conclusion that the search warrant did not impliedly authorize a search of the cell phone, as well as disagreeing with a number of other elements of the analysis in the Majority Opinion.

QUESTIONS ADDRESSED REGARDING (1) NEED FOR PROOF OF CAPACITY OF 11-YEAR-OLD TO COMMIT CRIME, (2) DEFENDANT'S LACK OF KNOWLEDGE OF AGE OF VICTIM NOT BEING AN ELEMENT OF THE CRIME OF CHILD RAPE IN THE FIRST DEGREE, AND (3) ADMISSIBILITY OF CHILD HEARSAY UNDER RCW 9A.44.120 AND MULTI-FACTORED TEST OF STATE V. RYAN

State v. A.X.K., ___ Wn. App. ___ , 2020 WL ___ (Div. II, February 11, 2020)

Facts and Proceedings below:

A.K. was a boy 11 years and 11 months old, and a younger boy, E.H., had just turned nine years old at the time that A.K. allegedly attempted to rape E.H. E.H. reported this event to relatives and subsequently to a governmental forensic interviewer.

A.K. was charged in juvenile court with attempted first degree rape of a child. The juvenile court did not hold a hearing or otherwise take evidence on the issue of whether A.K. had the capacity to commit crime at the time of the alleged act.

Key testimony in juvenile court came from relatives and the forensic interviewer who reported what E.H. told them. The juvenile court ruled that the hearsay evidence was admissible under the child hearsay statute at RCW 9A.44.120.

A.K. was adjudicated guilty in juvenile court of attempted first degree rape of a child.

ISSUES AND RULINGS: (1) Should the juvenile court adjudication of attempted rape of a child in the first degree be dismissed with prejudice on grounds that the juvenile court did not address the question of criminal capacity of A.X.K., who was under age 12 at the time of the alleged crime? (ANSWER BY COURT OF APPEALS: No, but the case must be remanded for the juvenile court to determine criminal capacity of A.X.K. at the time of the alleged crime)

(2) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another person who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim. To prove guilt of A.X.K. of attempted first degree rape of a child, was the State required to prove as an element of the crime that A.X.K. knew the age of the victim, E.H.? (ANSWER BY COURT OF APPEALS: No, the statute does not require, as an element of the crime, proof of a defendant's knowledge of the age of the victim)

(3) Did the juvenile court comply with RCW 9A.44.120 and the multi-factored test of State v. Ryan, 103 Wn.2d 165 (1984) in admitting the child hearsay statements of E.H. to relatives and the forensic interviewer? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal of Clark County Superior Court/Juvenile Court adjudication of A.X.K. for attempted rape of a child in the first degree. Remand to the juvenile court to hold a hearing to determine if A.X.K. had criminal capacity at the time of the attempted rape. If the Superior Court determines that A.X.K. had the capacity to commit the charged offense, the adjudication shall be affirmed. If the Superior Court determines that A.X.K. did not have the capacity to commit the offense, the adjudication must be dismissed.

ANALYSIS:

(1) Criminal capacity of A.X.K. remains to be proven on remand

On criminal capacity, the Court of Appeals explains in key part as follows:

> Children older than 8 but less than 12 years old "are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong." RCW 9A.04.050. However, capacity is not an element of attempted rape of a child in the first degree. "While capacity is similar to the mental element of a specific crime or offense, it is not an element of the offense, but is rather a general determination that the individual understood the act and its wrongfulness." State v. Q.D., 102 Wn.2d 19, 24 (1984).

> Here, the only evidence shows that the crime occurred in August 2016, when AK was 11 years old. Therefore, AK was presumed to lack capacity, and the State never rebutted that presumption. However, because capacity is not an element of the crime, AK's presumed lack of capacity does not implicate the sufficiency of the evidence.
>
> . . . .
>
> "The legal test [for capacity] is whether [the defendant] had knowledge of the wrongfulness of the act at the time he committed the offense." State v. J.P.S., 135 Wn.2d 34, 37-38 (1998). The State must overcome the presumption of an 8 to 12 year old's lack of capacity with clear and convincing evidence. . . . . "[W]hen a juvenile is charged with a sex crime, the State carries a greater burden of proving capacity, and must present a higher degree of proof that the child understood the illegality of the act." State v. Ramer, 151 Wn.2d 106 (2004).
>
> Until a juvenile's presumed lack of capacity is rebutted, the trial court does not have the statutory "authority to act" as to that juvenile. . . .
>
> Here, the only evidence in the record indicates that AK abused EH in August 2016, before AK turned 12 years of age. The only date given in the record came from the forensic interview when EH said the sexual assault occurred in August 2016. At trial, neither EH nor Alexander could provide a date. Nor did any circumstantial evidence exist from which a reasonable fact finder could have found that the incident occurred after AK turned 12 years of age. Therefore, a presumption exists that AK lacked capacity, and the State did not rebut that presumption. As a result, we conclude that the juvenile court lacked the statutory authority to enter a judgment against AK.
>
> However, we do not reverse AK's conviction as he requests. Rather, we remand for the court to hold a capacity hearing.

[Some citations omitted, others revised for stye]

(2) The State is not required to establish defendant's knowledge of the victim's age as an element of a crime of rape of a child

In response to defendant's argument that knowledge of a victim's age is an element of the various degrees of rape of a child, the Court of Appeals explains in key part as follows:

> AK argues that the crime of attempted rape of a child in the first degree requires the State to prove that "he was aware of the age difference between himself and E.H.," which it failed to do. . . . We disagree.
>
> "[T]he age of the victim of child rape – either the child victim's actual age or the defendant's belief in a fictitious victim's age – is material to proving the specific intent element of attempted child rape." State v. Johnson, 173 Wn.2d 895, 908 (2012). When a crime involves fictitious victims, the State must "prove that [the defendant] believed his victims to be minors." Johnson, 173 Wn.2d at 909. However, for non-fictitious victims, i.e., when the victim falls within the terms of the statute, the State need only "show that the defendant intended to have sexual intercourse with this victim" to prove the requisite intent. Johnson, 173 Wn.2d at 908.

Here, the State presented evidence that EH met the statutory definition. He was less than 12 years old, not married to AK, and AK was more than 24 months older than him. RCW 9A.44.073(1). Therefore, the State needed only to prove that AK intended to have sexual intercourse with EH and took a substantial step toward doing so. We conclude that sufficient evidence exists.

[LEGAL UPDATE EDITORIAL NOTE: Note that RCW 9A.44.030 provides an affirmative defense relating to defendant's knowledge of an alleged child rape victim's age. The affirmative defense was not raised as an issue in the A.X.K. case. The statute provides in relevant part:

> **(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.**
>
> **(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:**
>
> **(a) For a defendant charged with rape of a child in the first degree, that the victim was at least twelve, or was less than twenty-four months younger than the defendant;. . . .]**

(3) The juvenile court properly admitted the child hearsay under RCW 9A.44.120 and the multi-factored test of State v. Ryan, 103 Wn.2d 165 (1984)

In key part, the Court of Appeals analysis on the child hearsay issue is as follows:

> "RCW 9A.44.120 governs the admissibility of out-of-court statements made by putative child victims of sexual abuse." . . . RCW 9A.44.120 provides that statements of a child under the age of ten describing acts of, or attempts at, "sexual conduct performed with or on the child" are admissible in criminal proceedings, if the trial court concludes, after a hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability," and the child "[t]estifies at the proceedings."
>
> In determining the reliability of child hearsay statements, the trial court considers the following nine Ryan factors:
>
> > (1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statement, (4) the spontaneity of the statements, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contained express assertions of past fact, (7) whether the declarant's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement.

State v. Kennealy, 151 Wn. App. 861, 880 (2009). The reliability assessment is based on an evaluation of all the factors, and no single factor is determinative. . . . But the factors must be substantially met to establish reliability. . . .

AK challenges a number of the findings of fact; however, after applying the above principles of law, we conclude that substantial evidence supports the court's findings. In addition, after reviewing the findings, we conclude that the Ryan factors were substantially met to establish reliability.

The [juvenile] court carefully considered all of the Ryan factors and did not abuse its discretion in admitting the child hearsay statements.

[Some citations omitted, others revised for style]

INDECENT EXPOSURE: TOTALITY OF EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION UNDER RCW 9A.88.010 EVEN THOUGH THE COMPLAINING WITNESS DID NOT SEE THE DEFENDANT'S PENIS

State v. Stewart, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, February 10, 2020)

Facts and Proceedings below:

At around 10:00 a.m. on November 1, 2017, S.G. went shopping in Mount Vernon. As she was walking around a building to get to another store, she saw a man on the side of the building behind a dumpster. The man was kneeling on the ground in an upright position, and his body was moving erratically.

S.G. initially thought that the man was having a seizure. The man then turned and made eye contact with her. She noticed that his arm was moving back and forth. She also observed his hands by his genitals, and one of his hands moving rapidly back and forth. At that point, S.G. believed that the man was masturbating.

S.G. went into the store she was walking towards and told the store clerk that there was a man masturbating outside the door. The store clerk called the police. From inside the store, S.G. saw the man walk across the street to a parking lot. About 5 to 10 minutes later, [Officer A] arrived and contacted the man in the parking lot. [The officer] identified the man as Michael Stewart.

After consulting with an officer who had spoken with the reporting parties, [Officer A] placed Stewart under arrest. He advised Stewart of his constitutional rights. Stewart agreed to speak with [Officer A], and denied being next to the building where S.G. had seen him. [Officer A] told Stewart that other people had told him he had been next to the building and crossed the street just prior to his arrival. In response, Stewart stated that he had been over there, and thought he might have had a seizure. He did not request medical attention from [Officer A].

Later that morning, [Detective B] conducted an audio and video interview of Stewart at the Mount Vernon Police Department. During the interview, Stewart told [the detective] that he had experienced a seizure. He explained that when he experiences a seizure, he typically has about 12 seconds to loosen his tight fitting clothing. He stated that he

had undone his belt, and that, when he was seen, his top layer of pants was probably down around his knees.

The State charged Stewart with indecent exposure under RCW 9A.88.010(1) and (2)(c). Stewart waived his right to a jury trial. Following a bench trial, the trial court found Stewart guilty as charged. Stewart had 10 prior convictions. His two most recent convictions were for indecent exposure. The trial court did not find a basis to deviate from the standard sentencing range and sentenced him to 60 months of confinement.

[Footnote omitted]

ISSUE AND RULING: Are the trial court's findings of fact entered in support of the open and obscene exposure element of the crime of indecent exposure – particularly that part of finding of fact 6 that finds "clear evidence that [Stewart's] hand was not in his pants at the time and, in fact, that his penis was outside of his pants" – supported by substantial evidence? (ANSWER BY COURT OF APPEALS: Yes, "a rational, fair-minded person could conclude [from S.G.'s eyewitness testimony] that Stewart was masturbating with his penis outside his pants.")

Result: Affirmance of Skagit County Superior Court conviction of Michael Robert Stewart for indecent exposure.

ANALYSIS: (Excerpted from Court of Appeals Opinion)

A person is guilty of indecent exposure under RCW 9A.88.010(1) "if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm." While the statute requires "open and obscene exposure" of a defendant's person, no witness must see a defendant's genitalia for the State to prove that the defendant exposed himself in another's presence. State v. Vars, 157 Wn. App. 482, 491 (2010). The crime has been committed "[s]o long as an obscene exposure takes place when another is present and the offender knew the exposure would likely cause reasonable alarm."

Stewart argues first that a sentence in finding of fact 5 is not supported by substantial evidence. The challenged portion of finding of fact 5 states, "When [S.G.] was not more than 15 feet away from the man, she looked over her shoulder and saw the man's hand was by his genitals and his hand was moving back and forth rapidly."

S.G. testified that she was four or five yards away from Stewart when she saw his arm moving back and forth. The State then asked, "When you are saying you saw his arm moving back and forth can you tell us where his hands were in relationship to his body?" She responded that his hands were "[b]y his genitals." The State also asked her how quickly Stewart's hand was moving back and forth. She responded, "Rapidly." On cross-examination, S.G. clarified that she did not actually see Stewart's penis, but that his hand was "right in front of where his penis would be." She also stated that she could not tell if his pants were down.

Stewart contends that, looking at S.G.'s testimony as a whole, she saw his arm moving back and forth but only "inferred his hand was in the area of his penis." He asserts that if S.G. "actually saw his hands near his penis, as opposed to inferring where his hands were, she would necessarily have been able to see at the same time whether his pants

were down." But, S.G. clearly testified that Stewart's hands were by his genitals. She also stated that his hand was right in front of where his penis would be. This testimony constitutes substantial evidence supporting the trial court's finding that S.G. saw Stewart's hand by his genitals, and saw his hand moving rapidly back and forth.

Stewart argues second that finding of fact 6 is not supported by substantial evidence. Finding of fact 6 provides, "S.G. was not sure if she saw Mr. Stewart's penis because she saw his hand moving back and forth in the area of where his penis was. That is clear evidence that his hand was not in his pants at the time and, in fact, that his penis was outside of his pants."

S.G. testified that she saw Stewart's body moving around erratically, his hands by his genitals, and his hand moving rapidly back and forth. The State asked S.G. if she had any doubt in her mind as to what was going on at that point. She responded,

> You know, I thought I looked away when he made eye contact, and not wanting to watch I looked away. And for a fleeting moment in my head I thought, well, what if he's really having a seizure and he's hurt. As I got closer, past a tree, I remember looking over, and it was very obvious what he was doing. So I [did] have a second glance there, and looked over and confirmed; that's when I went into the store.

The State then asked her, "When you say it was very obvious what he was doing I'm assuming you are saying [you are] not believing he's having a seizure at this point?" S.G. responded, "Correct, correct, with his hand placement the way he was moving, kneeling, it wasn't a seizure."

Next, the State asked S.G. what she believed Stewart was doing. S.G. stated that it was "pretty obvious" Stewart was masturbating. When asked on cross-examination if she saw Stewart's penis, S.G. responded, "No, I don't think so." She then stated, "When I looked over and saw where his hand was that was enough." She explained that his hand was "right in front of where his penis would be."

Stewart argues that "S.G.'s testimony does not show it is more likely than not that his penis was outside his pants." He asserts that it is possible to masturbate "while the penis remains inside the pants." But, S.G. testified that it was "obvious" Stewart was masturbating, that his hand was moving rapidly back and forth right in front of where his penis would be, and that, when she looked over and saw where his hand was, "that was enough." Based on S.G.'s testimony, a rational, fair-minded person could conclude that Stewart was masturbating with his penis outside his pants. As a result, substantial evidence supports the trial court's finding that Stewart's penis was outside his pants.

Stewart argues last that finding of fact 7 is not supported by substantial evidence. Finding of fact 7 states that "[t]he exposure of the defendant's penis by the defendant was intentional." In challenging this finding, Stewart's only argument is that "the evidence does not show an exposure occurred." But, as established above, substantial evidence supports that an exposure did occur. And, despite claiming that he had a seizure, Carlson testified that Stewart did not ask him for help in seeking medical attention. Thus, substantial evidence supports that the exposure was intentional.

[Footnote omitted; some citations omitted, others revised for style]

UNLAWFUL IMPRISONMENT: TOTALITY OF EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION UNDER RCW 9A.40.010 WHERE DEFENDANT TWICE ORDERED A FELLOW CUSTOMER AT A 7-ELEVEN TO REMAIN IN THE STORE AND ALSO MADE A MENACING JUMP TOWARD THE VICTIM

State v. Dillon, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, February 3, 2020)

Facts: (Excerpted from Court of Appeals Opinion)

> On December 21, 2017, George Favors stopped at a 7-Eleven after he got off his bus in Lynwood. Favors takes the bus because he has glaucoma, partial vision in his right eye, and no vision in his left eye. When Favors entered the 7-Eleven, he was listening to music on his large Bluetooth headphones.
>
> Favors encountered Dillon standing near the entrance to 7-Eleven. Favors noticed that Dillon had scratches on his face, was bleeding, and intoxicated. Favors thought that Dillon was panhandling and told him he did not have change. Favors continued into the 7-Eleven.
>
> Dillon entered the 7-Eleven 10 to 15 seconds after Favors. Favors finished making his purchase and started walking towards the exit. Dillon was standing three feet in front of the exit. Dillon told Favors in a slurred voice to "get your ass back over there" and threatened to cut and shoot him. Favors feared that the situation would escalate and went to the back of the store.
>
> Favors tried to leave a second time and Dillon said "I told you one time; get your ass back over there." Favors, who is African-American, recalled hearing a racial slur. Favors discreetly called 911 on his Bluetooth headphones. Other 7-Eleven customers were entering and exiting without issue. The two store clerks were telling Dillon to leave. Favors indicated that Dillon appeared to be intimidating the clerks.
>
> [A law enforcement officer] responded to the call. When [the officer] arrived, he found Dillon outside the 7-Eleven, talking to someone in an SUV. [The officer] placed Dillon in handcuffs and as he was walking him to his patrol car, Dillon "rear[ed] his head back" and hit [the officer] on his forehead and the bridge of his nose. . . .

Proceedings below:

Dillon was convicted of (1) third degree assault for banging the back his head into the arresting officer, and (2) for unlawful imprisonment for his behavior toward Mr. Favors.

ISSUE AND RULING: Is there sufficient evidence in the record that defendant Dillon "restrain[ed]" Favors to support Dillon's conviction of unlawful imprisonment under RCW 9A.40.040? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Snohomish County Superior Court convictions of George Abraham Dillon for third degree assault and unlawful imprisonment.

ANALYSIS:

[] Dillon contends that State v. Kinchen, 92 Wn. App. 442 (1998), requires the State to prove that Favors had no reasonable means of escape as an element that Dillon knowingly "restrained the movements of George Favors in a manner that substantially interfered with his liberty," and that the State presented insufficient evidence that there was no escape. We disagree.

Restraint is "without consent" if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010(6). "A substantial interference is a real or material interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." State v. Washington, 135 Wn. App. 42, 50 (2006) (internal quotations omitted).

It is a defense to unlawful imprisonment that the victim had a means of escape. "Restraint" has four components and based on the facts of this case, if means of escape had been Dillon's defense, it could have negated either restraining another's movement or restraining in a manner that substantially interferes with a person's liberty. Means of escape "does not automatically preclude prosecution from unlawful imprisonment. But for the State to succeed on this theory, the known means of escape must present a danger or more than a mere inconvenience." Kinchen, 92 Wn. App. at 452, n.16.

First, Kinchen does not require that the State prove there was an absence of a reasonable means of escape. In Kinchen. the court held there was insufficient evidence to support a father's conviction for unlawful imprisonment of his two sons, because the sons had a reasonable means of escape. The two boys, ages 8 and 9, had Attention Deficit Disorder (ADD) and were "virtually uncontrollable." Because of this, the father restricted their access to the refrigerator and kitchen cabinets, occasionally locked them in the bathroom as punishment, and put locks on their bedroom door. The boys had keys to the bedroom, but they lost them and instead, used a window to enter and exit their bedroom. At other times, the sliding glass door was left unlocked giving the boys access to the main living area of house. Additionally, when the father left the boys alone at home, he left them food. The boys also had access to the bathroom and a water supply. The court concluded that there was insufficient evidence to support the father's conviction for unlawful imprisonment because parents have legal authority to restrict their children's access to areas of the home and the boys were able to leave their bedroom through a window.

Neither the State nor defense presented any evidence about whether Favors had a reasonable means of escape. This is not, however, fatal to the sufficiency of the evidence inquiry, because escape is a defense and not an element of unlawful imprisonment. Viewed in the light most favorable to the State, Favor's testimony is sufficient to find, beyond a reasonable doubt, that Dillon restrained Favors's movement, in a manner that substantially interfered with his liberty through intimidation, threats of violence, and by blocking the 7-Eleven exit.

Favors attempted to leave the 7-Eleven twice and the second time Dillon said "I told you one time; get your ass back over there" and "jumped at" Favors. Favors testified that Dillon was a "big enough guy he could have just took me and slung me all over the place." A reasonable juror could conclude Favors feared that disobeying Dillon's commands presented a serious risk of danger and that Favors felt intimidated by Dillon's orders and complied to avoid a physical confrontation. Dillon was also acting erratically and intimidating the 7-Eleven clerks who were trying to get Dillon to leave. Favors called

> 911 discreetly with his Bluetooth headphones after Dillon did not let him exit the 7-Eleven the second time because he "thought maybe he was pretty serious about this." Thus, sufficient evidence exists supporting that Dillon unlawfully restrained Favors.

[Some citations omitted, others revised for style]

LEGAL UPDATE EDITORIAL NOTE: The Dillon Court also points out, in response to an argument by the defendant, that in most prosecutions for unlawful imprisonment, the State need only prove that the defendant "knowingly restrain[ed] another person." The State is not required to prove that the defendant acted with knowledge of a lack of legal authority. The Court explains that the State is required to prove that the defendant acted with knowledge of a lack of legal authority only in special cases, such as cases involving bounty hunters, where a defendant claims a good faith belief that he or she had legal authority to restrain a person.

STALKING PROSECUTION: EVEN WITHOUT VIOLENCE OR THREATS OF VIOLENCE, THE EVIDENCE SUPPORTS INDUCMENT-OF-FEAR ELEMENT OF RCW 9A.46.110

In State v. Heutink, ___ Wn. App. ___ , 2020 WL ___ (Div. I, February 18, 2020), Division One of the Court of Appeals rules that the evidence was sufficient to support the inducement-of-fear element of the stalking statute.

RCW 9A.46.110(1)(b) of the stalking statute provides as an element of the crime that

> [t]he person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances . . . .

The Court of Appeals explains as follows that the evidence was sufficient to support this element of the statute (the Court describes other supporting evidence elsewhere in the Opinion):

> While Heutink and Kristi were still married, he texted her that he wanted to pick up some items from their family home after not having lived there for almost a year. Kristi asked him what he needed so that she could have someone else drop off the items, and he responded by saying that he was "coming to get [her]." He showed up at the house and refused to leave after police arrived. He then failed to comply with multiple orders of protection Kristi obtained against him. He continued to text, call, and e-mail Kristi, send her messages through other people, send her gifts, and go to her home.
>
> Kristi eventually moved to a new home and did not tell Heutink where she had moved. In August 2017, while an order for protection was in place, he showed up at Kristi's home late one night, knocked on the door, and rattled the doorknob. In September 2017, she was granted a restraining order against Heutink protecting her and their children for one year. At the hearing on the order, the commissioner had to tell Heutink to stop staring at Kristi and her attorney, Woodall. Heutink refused to sign the order, stomped out of the hearing, and slammed the door on his way out.

> Once the restraining order was in effect, Kristi received a text message from Heutink's friend Stuit. The text message stated that Heutink was wondering if he could see the boys, and asked when and where they should all meet up. On the day that the text message was sent, Stuit had left his phone in Heutink's car and did not have access to it. A few days later, Kristi received flowers at her home with a card that said, "'Have a good day." She received the flowers the day before she and Heutink were set to go to trial. Heutink had gone into a flower shop and ordered flowers for Kristi, but refused to give his name.
>
> Kristi grew more concerned after learning about an interview that Heutink had with [a detective] a few days after she received the flowers. [The detective] relayed to Kristi specific threats Heutink had made regarding Woodall and her former pastor, Kleinhesselink. During the interview, Heutink raised his voice and stated, "'Woodall should be scared." He also stated, "[Y]ou . . . should tell Pastor Chuck and Woodall that they're lucky I'm in here." At the end of October 2017 and into November and December 2017, Heutink mailed multiple letters and postcards to Kristi's father's house. One letter, addressed to Kristi's father and stepmother, directed them to communicate certain information to Kristi.
>
> **Heutink concedes that "[he] violated numerous protection orders," which "caused Kristi significant fear and intimidation." He also concedes that "[he] behaved inappropriately and had difficulty controlling his emotional responses to the end of his relationship." But, he contends that without evidence that he was actually violent or threatened actual violence, insufficient evidence supports that Kristi's fear was reasonable. He cites no authority to support this contention.**
>
> Viewing the evidence in a light most favorable to the State, a rational trier of fact could find that Kristi's fear of injury was one that a reasonable person in the same situation would experience. Accordingly, the evidence is sufficient to support Heutink's conviction.

[Emphasis added]

Result: Affirmance of Whatcom County Superior Court conviction of Donald John Heutink of felony stalking.

SANCTIONS ARE UPHELD AGAINST PLAINTIFFS' LAWYERS FOR UNJUSTIFIABLY ACCUSING POLICE OFFICERS OF PERJURY

In Watness v. City of Seattle, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, December 31, 2019), the Court of Appeals issues a February 3, 2020 order directing publication of its previously unpublished Opinion. The Opinion rejects the appeal of two attorneys (Karen Koehler and Edward Moore) from $20,000 + in sanctions awarded against the attorneys in a civil lawsuit where the two attorneys represent the estate of a person shot and killed by Seattle PD officers.

The introduction to the Court of Appeals Opinion capsulizes the ruling as follows:

> This appeal arises from a negligence suit filed on behalf of Lyles's estate. On June 18, 2018, Lyles was shot by two SPD officers and died as a result of her injuries. Koehler and Moore, counsel for Lyles's estate, filed a motion under RCW 9.72.090, alleging that

one of the officers had committed perjury during a deposition. The motion requested that the trial court refer the matter to the appropriate p[Officer B]cuting attorney's office. In response, the respondents moved for CR 11 sanctions against Koehler and Moore, alleging that the motion was not well grounded in fact or existing law, and lacked good faith arguments. The trial court granted the respondents' motion and imposed CR 11 sanctions. Koehler and Moore raise several issues on appeal, arguing in part that the trial court deprived them of due process, erred in excluding its expert witness, abused its discretion in imposing sanctions, and violated their First Amendment rights. We affirm the imposition of sanctions, but reverse as to the trial court's evidentiary ruling excluding the expert [the Court concludes, however, that the erroneous evidentiary ruling regarding the expert does not undercut the support for the trial court's sanctions].

Result: Affirmance of King County Superior Court order imposing sanctions.

DIVISION TWO AGREES WITH DIVISION ONE THAT WASHINGTON'S FAILURE-TO-REGISTER STATUTE IS UNCONSTITUTIONAL IN IMPOSING A DUTY TO REGISTER AS A SEX OFFENDER BASED ON AN OUT-OF-STATE CONVICTION FOR ACTIONS THAT WOULD NOT BE DEFINED AS A SEX OFFENSE IN WASHINGTON

In State v. Reynolds, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. II, February 4, 2020), Division Two of the Court of Appeals agrees with the ruling of Division One in ruling that a provision of the Sex Offender Registration Statute, RCW 9A.44.128(10)(h), is unconstitutional to the extent it imposes a duty to register as a sex offender based on an out-of-state conviction for which there is no comparable Washington crime. Just as Division One ruled in State v. Batson, 9 Wn. App. 2d 546 (Div. I, August 12, 2019), Division Two rules that the provision is an unconstitutional delegation of the legislative function to another state in violation of Article II, Section 1 of the Washington constitution.

Result: Reversal of Cowlitz County Superior Court conviction of Bradley Lewis Reynold for failure to register as a sex offender.

LEGAL UPDATE EDITORIAL NOTE: The Washington Supreme Court granted the State's petition for review in the Batson case that is relied upon by the Reynolds Court. Oral argument is scheduled in the Supreme Court in Batson for March 12, 2020.

****

SEARCH WARRANT RESOURCE CENTER (KING COUNTY PROSECUTOR'S OFFICE)

The following is excerpted from an October 2019 email message from King County Senior Deputy Prosecuting Attorney Gary Ernsdorff:

To All Law Enforcement in Washington:

Available to you now is a new Search Warrant Resource Center (SWRC). **The SWRC contains templates for over two dozen search warrants ranging from cell phones to social media platforms to many other types of businesses and tech companies.** The SWRC also contains templates for electronic surveillance matters, consent to search forms, and preservation letters as well as other resources. You can expect to see more content added on a regular basis.

For law enforcement officers **outside of King County**, the SWRC is available to you here: https://warrantportal.kingcounty.gov/justTemplates

For law enforcement officers **in King County**, the SWRC is available through the **Ingress portal** by selecting the **Search Warrant Resource Center** link. Accessing via Ingress will make available additional King County specific content such as after-hours contact information for judges and prosecutors and general information about submitting search warrants for judicial review. As of **October 1, 2019**, the search warrant number format has changed and will contain a 9-digit cause number, e.g. xx-0-xxxxx-x. New numbers are available in the SWRC and available at traditional channels through the end of the year.

[Legal Update Editorial Note: This Legal Update entry has omitted the email message's description of other services available to law enforcement officers in King County.]

For all officers, please use the feedback email PAOSpecOps@kingcounty.gov and send us your comments and questions.

Gary Ernsdorff
Supervising Attorney, Special Operations Unit
King County Prosecutor's Office
(206) 477-1989 – Office
(206) 965-5607 - Cell

Gary Ernsdorff
Dave Seaver
Val Epperson
Lindsey Thomas

****

CRIMINAL JUSTICE TRAINING COMMISSION'S "LAW ENFORCEMENT ONLINE TRAINING DIGEST" EDITIONS ARE CURRENT THROUGH JANUARY 2020

LED Online Training editions were recently added on the CJTC LED web page, making the monthly online publication available there through the January 2020 edition.

****

BRIEF NOTES REGARDING FEBRUARY 2020 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest,

Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though probably not sufficiency-of-evidence-to-convict issues).

The first entry below relates to a January unpublished opinion that I missed in last month's Legal Update. The remaining nine entries are February 2020 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results.

1. State v. Shelby Leigh Gibson: On January 30, 2020, Division Three of the COA, in a 2-1 vote (Judge Kevin Korsmo in dissent), rejects the appeal of the State from a Stevens County Superior Court dismissal of a district court citation for *assault in the fourth degree*. The citation was dismissed **because the law enforcement officer writing the citation omitted any allegation as to the underlying acts committed by Gibson**. The citation alleged that Gibson violated "9A.36.041" and further alleged that Gibson "DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES[:] ASSAULT 4TH DEGREE." Status: A motion for reconsideration was pending in the Court of Appeals as of March 6, 2020.

2. State v. Donna Rebecca Perry, aka Douglas Robert Perry: On February 4, 2020, Division Three of the COA rejects the appeal of the defendant from her Spokane County Superior Court convictions for *three counts of first degree premeditated murder*, with the aggravating circumstance in each case being the fact that the murder was part of a common scheme or plan involving more than one victim. The Court of Appeals rules that the detectives who interrogated the defendant did not violate her rights under **the initiation-of-contact rule of Miranda and Arizona v. Roberson, 486 U.S. 675 (1988)** where: (1) they stopped the interrogation as soon as she asked for an attorney; (2) they then took her DNA under an already-existing search warrant; (3) they told her that she would be transported to jail; (4) she volunteered that she wanted to resume talking about the case; and (5) they re-Mirandized her and then resumed the questioning. **LEGAL UPDATE EDITORIAL RESEARCH NOTE: For an article by John Wasberg on "Initiation of Contact Rules Under the Fifth Amendment," go to the Criminal Justice Training Commission's internet LED page under "Special Topics."**

3. State v. D.A.D.: On February 4, 2020, Division Two of the COA rejects the appeal of D.A.D. from his Cowlitz County Superior Court *juvenile court adjudication for manslaughter in the second degree* for the death of EV. The Court of Appeals notes that the **corpus delicti rule for homicide cases requires proof of both the fact of death and a causal connection between the death and a criminal agency, but the rule does not require proof of a causal relation between the death and the accused**. State v. Lung, 70 Wn.2d 365, 371 (1967). The evidence in this case is clear (1) that the victim did not commit suicide, and (2) that the shooting was not in self-defense. Therefore, the corpus delicti of manslaughter is established by the record, and therefore the juvenile defendant's admissions of guilt are admissible under the rule.

4. State v. Aaron Justin Calloway**:** On February 10, 2020, Division One of the COA rejects the appeal of defendant from his Snohomish County Superior Court conviction for *possession of methamphetamine*. The Calloway Court holds that **an officer made a Terry seizure of Calloway** when the officer said to Calloway: "How you doin' partner? Come over here and talk to me for a second." However, the Court of Appeals holds that **the Terry seizure was justified by reasonable suspicion** where (1) the owners of the house that the officer saw Calloway

enter had requested that police document and remove any person on that property except for two identified male individuals and their visitors, and Calloway was not one of the two identified male individuals; and (2) Calloway appeared by his conduct – including exiting the house through a different door than the door he used to enter and picking up a bicycle and starting to ride away – to be trying to evade contact with the officer.

5. State v. Kenneth Lee Kyllo: On February 11, 2020, Division Two of the COA rejects the appeal of defendant from his Cowlitz County Superior Court convictions for *two counts of unlawful possession of a controlled substance with intent to deliver*. The Kyllo Court holds that **probable cause information in a search warrant did not become stale** where (1) the search warrant affidavit stated that the CI met with the officer-affiant that day; (2) the CI stated that the CI was in a hotel room "within the past 72 hours" and saw approximately eight ounces of heroin on a table in the room (a relatively large quantity of drugs); and (3) the search warrant issued and was executed the same day as the application. The Kyllo Court also holds that, **while the affidavit did not establish the CI's basis of knowledge for the CI's statement that the heroin belonged to Kyllo, this was irrelevant to the question of probable cause to search the hotel room for heroin, whoever the heroin might belong to**.

6. State v. Calvin Perry Luarca: On February 19, 2020, Division Two of the COA rejects the appeal of the defendant from his Clark County Superior Court convictions for *burglary in the first degree, assault in the fourth degree, interference with the reporting of domestic violence, theft in the second degree, tampering with a witness, and a domestic violence court order violation*. The Court of Appeals rules that **the trial court did not err in allowing – as evidence of consciousness of his guilt – testimony that shortly after the crimes defendant gave a false name to medical staff while an officer investigating the crimes was standing nearby**. The Court of Appeals analogizes the case to State v. Hebert, 33 Wn. App. 512 (1982) (addressing flight as evidence of consciousness of guilt) in rejecting defendant Luarca's argument that (1) the reason he gave a false name was to evade being arrested for a probation violation, and (2) allowing the false-name evidence to go to the jury would put him in the unfair situation of needing to tell the jury about his irrelevant and prejudicial probation status.

7. State v. Stephen Neil Timmons: On February 19, 2020, Division Two of the COA agrees with the appeal of defendant from his Clark County Superior Court conviction for *assault in the third degree* (note that defendant did not seek review of other crimes for which he was convicted). Defendant Timmons used a garden hose to flood the upstairs bedroom of his ex-girlfriend's house. The police responded to the incident, and a piece of drywall fell off the ceiling. It struck a police officer in the head, giving him a concussion. A jury convicted Timmons of assault in the third degree, along with various other crimes. The Court of Appeals relies on State v. Marohl, 170 Wn.2d 691 (2010) and State v. Shepard, 167 Wn. App. 887 (2012) in **ruling that the drywall that hit the police officer was not "a weapon or other instrument or thing likely to produce bodily harm" within the meaning of the assault in the third degree statute, RCW 9A.36.031(1)(d)**.

8. Terry E. James v. Kondjeni Liyambo (K.L.): On February 24, 2020, Division One of the COA rejects the appeal of K.L. from the King County Superior Court *one-year anti-harassment order*. K.L. was a middle school student when he sent a story he wrote to several fellow students who were specifically identified and featured in the story. The story contained threats, violence, and sexual innuendo relating to the fellow students. The Court of Appeals rules that **(1) the factual record and the court's findings support the order; (2) the trial court considered appropriate factors set forth in RCW 10.14.040(7); (3) the protection order does not**

impermissibly infringe on protected free speech; and (4) the provisions of the order are not overly broad.

9. State v. F.B.T.: On February 25, 2020, Division Three of the COA reject's F.B.T.'s appeal from his Klickitat County Superior Court (juvenile court) adjudications for *first degree child molestation, indecent liberties and witness intimidation*. F.B.T. failed in his appellate argument that his waiver of Miranda rights was not voluntary in light of his age (13), his IQ (70-80), and diagnoses of ADHD, depression, anxiety and sleep disorder. At age 13, he was already well-known to local law enforcement and the juvenile court, and had experienced numerous previous contacts with the interrogating officer. **The appellate panel explains that the audio recording demonstrates voluntariness of Miranda waiver, in that the juvenile was correctly advised of his Miranda and juvenile rights; he understood what he was doing; he was not confused; and he was experienced with the juvenile justice system and appeared to understand his rights and the consequences of speaking with the officers.**

10. State v. Shiloh Korack Kelley: On February 25, 2020, Division Three of the COA rejects that defendant's appeal from his Spokane County Superior Court convictions for *possession of a controlled substance and for making a false statement*. The Court of Appeals rules that **defendant was not seized at the point when an officer shined his flashlight through a car's windows** and observed likely illegal drugs and drug paraphernalia in open view. The Court of Appeals describes the relevant facts as follows:

> [The officer] was on patrol at 3:00 a.m. on June 26, 2018. He pulled into a gas station and observed a woman suddenly leave her car and enter the convenience store. [The officer] aproached her vehicle and shined his flashlight through the window. Inside he observed a methamphetamine smoking device, a white crystalline substance on the floor, and a male – later identified as the appellant – in the backseat.

****

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the current and three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case

law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local p[Officer B]cutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

****

INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be a ccessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training can be found on the internet at [cjtc.wa.gov/resources/law-enforcement-digest].

****